No. 87-1972

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1987

Vernon Lee Bounds, et al.,

Petitioners,

v.

Robert (Bobby) Smith, et al.,

Respondents.

PETITIONERS' REPLY BRIEF

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The petitioners respectfully submit the following brief, pursuant to Supreme Court Rule 22, in reply to respondent's brief opposing the Petition for Writ of Certiorari.

INTRODUCTION

The two issues for review in this case are (1) whether the lower courts ignored exceptional circumstances justifying an opportunity for petitioners to present evidence that they are in compliance with the approved law library plan and, (2) whether the lower courts violated the law of this case by ordering petitioners to replace their law library plan with a lawyer assistance plan. Respondents' brief in opposition to the petition contains two arguments first raised in that brief concerning these issues. First, respondents argue that petitioners, the Attorney General, and both their predecessors were not only aware of Jacob Safron's failure to comply with court orders, but actually directed him to do so as part of a "litigation strategy" to avoid or delay implementation of the law library plan. Second, respondents argue that the district court has broad equitable powers authorizing its departure from the law of the case. These new arguments necessitate a reply under Rule 22.2 of the Rules of this Court.

ARGUMENT

I. THERE IS NO EVIDENCE TO SUPPORT RESPONDENTS' CONSPIRACY THEORY.

A. The Record Shows That Petitioners Were Unaware of Mr. Safron's Inaction.

The *en banc* opinion of the Fourth Circuit Court of Appeals upheld the district court's conclusion that petitioners had to share in Mr. Safron's inexcusable neglect of the December 21, 1984 order because they "knew or should have known that counsel has a history of failing to respond to the court's orders." ***Bounds v. Smith***, 841 F.2d 77, 78 (4th Cir.1988). (A-29) This conclusion is clearly erroneous. The dissent correctly pointed out that there was no evidence to support such a conclusion. 841 F.2d at 82. (A-36,38) However, respondents have not only embraced the majority's statement, but have contorted it to fit their theory that petitioners, the Attorney General, and their predecessors, were engaged with Mr. Safron in a "deliberate strategy" of delay spanning more than a decade, two departments and two administrations. Neither the *en banc* majority opinion nor the record supports this incredible theory.

The *en banc* majority did not find that petitioners and the Attorney General plotted with Mr. Safron to ignore the district court's December 21, 1984 order or that they were actually aware of his failure to respond. The most that can be drawn from the majority's conclusion is that petitioners' failure to monitor Mr. Safron more closely after December 21, 1984 was not excusable because they knew or should have known that he had failed to timely respond in the past. However, there is absolutely no evidence in the record that the petitioners were ever informed of Mr. Safron's previous untimely responses nor did the district court ever issue any reprimand either to Mr. Safron or to the petitioners which could have alerted them to Mr. Safron's failures. Nevertheless, respondents unabashedly state in their brief that the majority "concluded that the most recent default was...the product of a deliberate strategy." (Respondents' Brief, p. 10)

Respondents then attempt to support the conspiracy argument with "facts" that are purely products of the imagination. For example, they state, as though it were an established fact, that the Department of Correction's chief in-house counsel, Mr. Irons, and a staff member, Barbara Shaw, "were aware that [Safron] had not responded to the district court's December 21, 1984 order." (Respondents' Brief, p. A 2) [1] However, the *uncontradicted* evidence in the record is that (1) Irons directed Shaw to gather the materials relevant to compliance (A-77; A-577); (2) Shaw did so and forwarded revised policies concerning the photocopying issue to Safron (A-77-78); (3) Irons was told by Safron that he would get back to Shaw if he needed more material (A-577) and, (4) Shaw assumed that Safron had taken care of the matter and did not need further affidavits or information when Safron did not get back to her. (A-78)

As further support for their complicity theory respondents assert that Irons and Safron actually agreed to delay responding to the December 21, 1984 order during a telephone conversation in January of 1985. (Respondents' Brief, p. A 14) However, that assertion is not based on any fact in evidence, but rather on respondents' suggestion that since Irons did not say in his affidavit that he asked Safron for an assurance of timely response to the district court's order that "it is more likely that they agreed that Safron not respond in timely fashion." (Respondents' Brief, p. A 14) This is innuendo, not evidence, and it must be rejected.

Finally, respondents suggest that Attorney General Lacy Thornburg must have known of and condoned Safron's failure since "Safron himself was a member of the Attorney General's staff," (Respondents' Brief, p. A 3), and since he did not dismiss Safron afterward. (Respondents' Brief, p. A 2) These unwarranted conclusions

1 Much of respondents' argument is contained in the parts of their brief designated as "appendices" which, when added to their brief, constitute a total of forty-two pages. This is a flagrant attempt to circumvent this Court's thirty page limitation in Rule 22.

fly in the face of the record which contains the uncontradicted affidavit of Attorney General Thornburg that he did not assume office until January 5, 1985 and did not become aware of the district court's December 21, 1984 order, or Safron's non-compliance with it, until the order of May 15, 1985. Further, the suggestion that Thornburg should have dismissed Safron in order to show appropriate contrition serves better as evidence of a degree of respondents' vindictiveness than as evidence of complicity by the Attorney General.

As shown above, respondents have grievously misinterpreted the majority's holding in this case that the district court's conclusion that petitioners are accountable for Safron's failure to respond to the December 21, 1984 order since they knew or should have known of his previous tardiness, was not "clearly erroneous." *That holding is itself unsupported* since, as pointed out by the dissent, there is no evidence that petitioners or the Attorney General, who assumed office in January of 1985, were in fact aware of Safron's prior failures. Further, the conclusion that petitioners "should have been aware" of those failures is not a finding of fact subject to the "clearly erroneous" standard of review, but is a conclusion of law tantamount to a holding that state officials are strictly liable for the transgressions of the attorneys assigned to them. However, that is not, and should not be, the law.

B. The Petitioners Are In Compliance With Their Law Library Plan.

The respondents claim that the petitioners have never been in compliance with the law library plan this Court approved in 1977. ***Bounds v. Smith***, 430 U.S. 817 (1977). However, in fact, the district court has twice found the petitioners in compliance with their plan, dismissing the case each time. (A-54; A-56) Two different federal judges, the Honorable John D. Larkins and the Honorable Franklin Dupree, entered the dismissals. (A-54; A-56) And, in the Fourth Circuit's most recent panel decision, the court stated that "[t]he documents submitted to the district court in support of the [petitioners'] motion for reconsideration indicated that the state law library system may have been in compliance with constitutional requirements." ***Bounds v. Smith***, 813 F.2d 1299, 1303 (4th Cir. 1987). (A-22)

Moreover, the attachments to the petitioners' initial motion for reconsideration (A-70) contained information and documentation demonstrating that they are in compliance with their law library plan. (A-76 through A-569)

On the Fourth Circuit's last remand to the district court in this matter, which precipitated the district court order of December 21, 1984, only three issues were left for a determination of compliance: (1) availability of photocopying for indigent inmates, (2) training of inmate paralegals, and (3) actual use versus requested use of the law libraries. ***Harrington v. Holshouser***, 741 F.2d 66 (4th Cir. 1984) (***Harrington II***). (A-6) Those issues were specifically addressed in the attachments to the petitioners' initial motion for reconsideration. Documents of actual law library logs demonstrated compliance with the photocopy and access issues, and documentation of training workshop materials for five law library paralegal workshops held during the time period including February, 1983 through June, 1985 demonstrated compliance with the paralegal training issue.

The petitioners, contrary to respondents' allegations, had no reason to delay response to the district court's December 21, 1984 order to show compliance for they had nothing to gain by such delay. *They were in compliance*. They had the documentation to prove they were in compliance. They made that documentation available to their counsel, Mr. Jacob Safron.

Moreover, the respondents' reference to the petitioners' efforts to comply with their law library plan as a "chronology of failure" is a complete misrepresentation of that quotation, both as to its meaning and to its intent. The "chronology of failure" statement comes from the Fourth Circuit's decision rendered August 14, 1984, which remanded the case to the district court for fact findings. 741 F.2d 66, 69. (A-12) The statement was made with specific reference *only* to training of inmate paralegals, and not to any other aspect of the petitioners' law library plan. (A-11, 12) Further, even after noting this deficiency, the Fourth Circuit specifically rejected the respondents' request that trained lawyers replace the law library plan. (A-12)

In summary, the petitioners have not delayed implementation of a constitutionally acceptable law library system. The petitioners may have encountered problems with full implementation, such as the difficulty in finding professionals to train inmate paralegals, but those problems were overcome and the petitioners were in compliance with their law library plan when their former counsel failed to respond to the district court's December 21, 1984 order to show compliance. Petitioners seek only their day in court.

II. THE DISTRICT COURT VIOLATED THE LAW OF THIS CASE.

The respondents argue that the district court did not violate the law of this case but simply used its equitable power to "assure an effective remedy." (Respondents' Brief, p. 15) In support of this statement, the respondents rely, almost entirely, on ***United States v. Paradise***, 480 U.S.___, 94 L.Ed.2d 203, 107 S.Ct. 1053 (1987). ***Paradise*** is, however, clearly distinguishable from the case at bar. ***Paradise*** concerned the Alabama Department of Public Safety's persistent failure to develop and propose a promotion plan which would eliminate racial discrimination. The petitioners in the case at bar have had their court approved law library plan in effect for many years.

Further, the remedy imposed by the district court in ***Paradise*** was a temporary one, which was extremely limited in nature and its duration was strictly dependent upon the defendants' own actions. 94 L.Ed.2d at 230-31. The remedy imposed by the district court in the case at bar, replacement of law libraries with licensed attorneys, completely eliminated the right given to the petitioners by this Court to choose their own remedy and is permanent, rather than temporary, in nature.

Justice O'Connor's dissent in ***Paradise***, joined in by Chief Justice Rehnquist, Justice Scalia, and Justice White, emphasizes the very points the petitioners have raised in the case at bar: (1) the district court failed to attempt any alternatives, such as a contempt order, or fines, or sanctions, or a combination of penalties, prior to entering its remedy, and, (2) the lack of discussion of other options by the dis-

trict court reveals that there was no "balancing process" used by the district court in fashioning its remedy. 94 L.Ed.2d at 241-43.

This Court gave the petitioners the right to choose the method of providing inmates access to the courts. That right was taken from the petitioners in the present case by default, and without the district court ever considering alternative options to require the petitioners to show compliance with their plan *and* with no discussion of why other options would not be appropriate. This was a clear violation of the law of this case.

CONCLUSION

For the reasons stated above, as well as all the reasons set forth in the petitioners' Petition for Writ of Certiorari, the petition should be granted.

This the day of July, 1988.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Petitioners' Reply Brief have been served upon the following by depositing three (3) copies of the same in the United States Mail, postage prepaid, addressed to:

Mr. Barry Nakell
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This the 7th day of July, 1988.

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